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ABSTRACT

Three political scientists diagnose the current state of political influence on jury selection in political trials, based upon personal experience, upon the literature of political theory, justice, and law, and upon recent action of lawyers, judges, defense committees, and some defendants. Political trials are interpreted as formal examinations of persons who have threatened governmental authority. Trials of Huey Newton, Angela Davis, the Chicago 8 and Dr. Spock are noted as examples. The paper considers five major topics: (1) the relationship between political action and political knowledge; (2) constitutional and legal procedures of jury selection from composition of the jury pool to selection of particular juries; (3) the social science techniques utilized in jury selection; (4) the politics of jury selection; and (5) designation of areas related to the jury selection process in which political action could be initiated and encouraged. The authors recommend that activists consider the potential for political action during political trials. The conclusion is that political scientists should give serious philosophical and empirical attention to political trials, should reflect on the possibilities for political action through involvement in such trials, and should absorb into political science the concomitant development of knowledge about this area where politics and justice mix. (Author/DB)

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JURY SELECTION AS POLITICAL ACTION

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JURY SELECTION AS POLITICAL ACTION

Diane L. Fowlkes, Lawrence E. Noble, and Bernard Bray

The past ten years have seen the politics of protest move from the streets and the campuses to the courtroom and, once there, to the jury selection process. The protest has come in response to oppressive treatment of Black people, young people, and others who have threatened the authority of a government perceived by them as unjust. The trials of Huey Newton, Angela Davis, the Chicago 8, Dr. Spock, Daniel Ellsberg and Tony Russo, the Catonsville 9, the Wilmington 10, Joanne Little, and Inez Garcia have been among those reflecting the political struggles of the decade: Black Power, the Anti-War-in-Vietnam movement, Women's Liberation, and the general movement of the New Left to generate "power for the people."[1] Members of these diverse groups increasingly have come to realize that government has made special efforts to prosecute and emprison them. They have changed the emphasis of their political strategy from using the courtroom as a stage for raising issues to selecting juries that are as unbiased against them as possible in order to maintain their innocence.

Counsel for the defense of Huey Newton and the defendant himself early became aware of this government strategy to prosecute and emprison. They saw the value of utilizing as many legal means as possible to protect themselves in court. One aspect of defense strategy was focus on the jury, who, if chosen in a fair and representative fashion, could become the last best hope for doing justice. Jury work for this trial involved pre-trial motions to challenge the jury selection system, which at that time was producing unrepresentative jury pools, and careful development of voir dire questions to determine potential jurors' racial prejudices (Ginger, 1969).

Meanwhile, the defendants and counsel in the trials of Dr. Spock and colleagues and of the Berrigan brothers and colleagues in Catonsville, Maryland, depended on the theory of jury nullification to make their political points in court and to win acquittals. The theory of jury nullification posits that jurors have the power to "ignore the instructions of the court and reach a verdict based upon their own consciences or their own interpretation of the law" (Jacobsohn, 1977, p. 77). While these trials may have been successful in politicizing the community about the issues related to the war in Vietnam, the defendants lost their cases for acquittal to jurors who either did not understand their power of nullification or did not wish to challenge the authority of the court.

By the time of the second Berrigan trial, some defendants, lawyers, and defense committees began to see the need to use all possible legal means to secure juries less prejudiced against the defendants. In this action they not only covered the ground broken in the Newton trial; they also began to develop other techniques for challenging the whole jury process. In Harrisburg, Pennsylvania, Jay Schulman, sociologist then at Cornell University,

and Richard Christie, social psychologist at Columbia University, headed an effort to apply social science methods to jury selection (Fargo, 1977a; Schulman et al., 1973). They reasoned that jurors are audiences. The people in these audiences, as in all audiences, perceive "facts" through attitudinal screens. People cannot be expected to change basic attitudes toward protester types or other types of minority defendants during the relatively short period of a trial. The defense, therefore, should attempt to select as many jurors as possible whose attitudes toward the defendant types are the least unfavorable and the least in need of being changed (Fargo, 1977b). Since juries have tended to be over-representative of older, white males of the middle classes, the concern of defense teams has translated into selecting juries whose members are more representative of the community where the trial will occur. Representative means fair cross-section of the community (Taylor v. Louisiana, 419 U. S. 522, 530, 1975), containing people of a wide range of social and demographic characteristics with a correspondingly wide range of attitudes and beliefs about protest and free speech, minorities, and government authority. Schulman and Christie have gone on to work with other concerned social scientists and political activists to form the National Jury Project (Fargo, 1977a). They continue to become involved professionally and politically in a number of political trials in various parts of the United States.[2]

Following the lead of the members of the National Jury Project, we as political scientists also have become involved in political trials in the South, especially in Alabama and Georgia. Being deeply concerned about the poor quality of justice in the United States and disturbed by repressive state practices militating against the achievement of justice, we have turned to jury work for the purpose of counteracting these unjust political conditions. This paper is based on our experiences, observations, and reflections about such involvements.

Our actions can be understood best perhaps from the perspective of Sheldon Wolin. Writing in 1969, he expressed his concern about the failure of political scientists to address the political trials then in progress. He wrote:

> . . . one cannot help wondering whether political science, having jettisoned "metaphysical" and "normative" preoccupations about justice in favor of research into "judicial behavior" and the "judicial process," are (sic) not reaping the results: an inability to address a major phenomenon like the dangerous rash of political trials in America today and to reflect upon what these trials signify for the future of the authority and legitimacy of the state (Wolin, 1969, p. 1075).

We hope that few in our profession would disagree with the following conclusion: political scientists should give serious philosophical and empirical attention to political trials and should reflect on the possibilities for political action through involvement in such trials and for the concommitant development of knowledge about this crucial area where politics and justice mix. We need to develop the philosophical perspectives

that will lead us to ask the important questions about the politics of justice with the hope that the "inability" that Wolin charged us with will not become permanent.

Involvement in jury selection for political trials can lead to the development of at least three levels of knowledge. On the first level, involvement in jury selection requires the participant to learn the concrete, day-to-day operations of the process. On the second level, reflection on such involvement can result in clearer understanding of the political nature of the day-to-day operations and development of strategies to broaden the scope of political conflict. These strategies include attempts to counter-socialize the participants in the process and traditional community organizing efforts around the immediate issues of a particular trial and the broader issue of doing justice. On the third level, further reflection can lead to an understanding of the nexus between political action and political knowledge. In this paper, we will report some of what we have learned at these three levels. We will (1) analyze the inter-relationships of political action and political knowledge, (2) describe jury selection in terms of constitutional and legal procedures and social science techniques, and (3) discuss the politics of jury selection as performed by defense teams consisting of defendant(s), defense counsel, social scientists, and defense committees. We will conclude by discussing a theoretical perspective that can guide further political action around jury selection.

Political Action and Political Knowledge

A political science oriented toward political action[3] requires an understanding of what is meant by political knowledge. Political knowledge on which to base action requires testing of what is thought to be political reality and then redefinition of it (Kariel, 1969). It requires self-knowledge and the location of self in political space so the political actor will be able to judge the merits of various political actions and the capacities of self in relation to context.[4] The degree of completeness of one's political knowledge can be discovered only as the self is tested in political action and one becomes more aware of the context in which one acts.

Wolin (1969, p. 1070) provides a useful description of a dimension of political knowledge that often goes unrecognized. He writes of composite type of knowledge:

> Its mode of activity is not so much the style of the search as of reflection. It is mindful of logic, but more so of the incoherence and contradictoriness of experience. And for the same reason, it is distrustful of rigor. Political life does not yield its significance to terse hypotheses, but is elusive and hence meaningful statements about it often have to be allusive and intimative. Context becomes supremely important, for actions and events occur in no other setting. Knowledge of this type tends, therefore, to be

> suggestive and illuminative rather than explicit and determinate. Borrowing from Polanyi, we shall call it "tacit political knowledge."

We hold this image of political knowledge in mind as we explore the meaning of jury selection as political action.

We posit that one cannot obtain the highest level of political knowledge without a nexus of the vocation of political science and the vocation of political activist. In order to develop more effective political action, we need to remove the masks from hidden political knowledge[5] and put both it and tacit political knowledge "on stage," to place them in public view. This requires unusual procedures. It requires combinations of political actions as instruments of investigation with social science investigations as instruments of political action.

Successful linkage of political action with political knowledge development is not easy to achieve. Anyone who has attempted to link the vocation of political science with the vocation of political activist and has experimented with the combination of political action and social science research understands the difficulties of linking two vocations in one person. One role calls for objectivity while the other role calls for commitment to a specific set of beliefs.[6] Furthermore, no one should be surprised if such investigations fail to meet the expectations of others and of self. In such situations the investigator is part of the stimulus to further political action. Here we see the special importance of ability to know self and relate to context if any useful political knowledge is to be gained from political action.

Finally, in this inquiry, we realize that nothing is more dangerous than to think that there is only one possible interpretation of facts, since " . . . facts are more multi-faceted . . ." (Wolin, 1969, p. 1073) than is ordinarily recognized. This multi-faceted nature of "facts" is part of the source of conflict in the political arena. In regard to political knowledge development, also, Wolin (1969, p. 1973) reminds us that " . . . nothing . . . is more necessary as a condition for theorizing than that facts not be univocal." Through facts and concrete processes we try to open new possibilities for political knowledge in the context of political actions.

Constitutional and Legal Procedures of Jury Selection[7]

In the realm of constitutional theory, jury selection is part of the continuing struggle through the decades to spread the concept of full citizenship from the elites to all of the people and to put it into practice. Juries traditionally have been drawn from elites. Most of the crimes in our society that are prosecuted are allegedly done by non-elites. Hence the history of trial by jury in this society has been largely that of elites judging non-elites, the politically powerful judging those who are powerless.[8] The effort to expand jury service to all the people is part of the struggle to gain some political power over one's own who are accused of crime.

It is simply an effort to have the fair trial principle made more realistic, applied to everyone. The same explanation is true for the efforts to have the grand jury drawn from a group that includes the elite and the non-elite.[9]

The courts have adjudicated for many decades about various aspects of the institution of the jury. What size should it be? When must the jury be used? Who shall serve on the jury? How shall the members be selected? By what vote shall the jury make its decision?

It has long been held that juries may vary in size, and need not be composed of only twelve persons (Maxwell v. Dow, 176 U. S. 581, 1900).[10] This has been reconfirmed recently by the Burger Court (Williams v. Florida, 399 U. S. 78, 1970). For the October, 1976, term that Court accepted a case for hearing where a jury of five persons in a Georgia misdemeanor proceeding was challenged as not large enough to furnish adequate constitutional protection for the defendant (Ballew v. Georgia, 50 L. Ed. 2d 789, certiorari granted January 25, 1977).

The Supreme Court has ruled that a jury trial must be granted if desired in cases where the punishment for the alleged crime is "serious" (Duncan v. Louisiana, 391 U. S. 145, 1968). Certainly possible incarceration for two years is a serious penalty to pay. Lesser penalties can also carry the "serious" label (Bloom v. Illinois, 391 U. S. 194, 1968). Of course one may waive the right to a jury trial if the waiver is done properly (Hallinger v. Davis, 146 U. S. 314, 1892; Patton v. U. S., 281 U. S. 276, 1930).

The Supreme Court takes the position that a jury must be drawn from a cross-section of a community, a fair cross-section (Taylor v. Louisiana, 419 U. S. 522, 530, 1975). This is perhaps the most vital issue in contemporary jury selection politics. Race is an ingredient of a cross-section. Racial classification may not be used for excluding potential jurors.[11] Sex is also a forbidden classification for exclusion (Taylor v. Louisiana, 419 U. S. 522, 530, 1975). To date there is not enough good case law on what age groups must be included or may be excluded.[12] The same is true for classifications based on socioeconomic class.[13] The classification of the latter issue, through adjudication in the near future, seems to contain the next best hope for the masses of people as they struggle to obtain a fair and justly drawn jury to consider their cause.

Key factors in the matter of who shall be considered for selection include the source of the names of potential jurors and how these names are taken from the source. The jury list, or jury pool, commonly is taken from such sources as voter registration rolls, telephone books, city directories, public utility customer lists, and personal acquaintances of those who do the selecting. The U. S. government takes its jurors from voter registration lists (Jury Selection and Service Act of 1968, 28 U. S. C. §§ 1861-69). The states generally use locally or state selected jury commissioners to make the selections from some or all of the above listed sources. The commissioners then use legal criteria such as upright, responsible, moral, of good judgment, and other such imprecise and subjective concepts for taking the particular name from the source list.

It is at this juncture in the jury process that discrimination enters in a wholesale fashion.[14] The remedy for much of this lies with the state legislatures. Unfortunately the Supreme Court has approved these vague and subjective criteria which are ready-made for triggering the individual prejudices of the pool selectors (Jones v. Georgia, 389 U. S. 24, 1967; Carter v. Jury Commission, 396 U. S. 320, 1970). In any event, it is in this fashion that the names from all source lists are culled down to a smaller number from which an even smaller panel or venire list[15] will be taken for a term of court.

Juries usually are selected in the courtroom in one of two ways. One procedure is to select a panel of a fixed number of names, then strike off the unwanted names, the parties alternating in striking, until there are twelve names left, plus alternate jurors where needed. The striking is done after the voir dire by the lawyers and/or the judge.[16] It is customary to give the defense more strikes than the prosecution in criminal procedure, whereas the two parties have the same number of strikes in a civil case. The strike procedure allows each side to view in detail the entire panel, member by member, before making the selections. Generally the judge permits the lawyers to do the voir dire of individual panel members. In the federal jurisdiction, however, it is much more difficult to obtain lawyer voir dire, and especially lawyer voir dire of the individual panel member while the rest of the panel is out of the courtroom. Federal judges generally have more power over this procedure than do state judges. Judges vary from one to another, of course, and some federal judges are more generous and less pontifical than others in granting lawyers extended voir dire. Extended voir dire, that is, more favorable questioning circumstances, is more likely to be granted when the defense team can show the judge that the jury pool does not contain a fair cross-section of the community.[17]

The other common procedure for voir dire selection is the use of a fixed panel, but questioning and selecting jurors one by one, building up to twelve rather than paring down to twelve. Hence conceivably only twelve persons could be called and the jury would be complete. This approach is less valuable to the parties, for many panel members who might be from the defendant's social and demographic groups may never reach the stage of being selected or rejected.

Each side has two sets of challenges in jury selection. Peremptory challenges are those where no reason is necessary in order to dismiss the potential juror. Peremptory challenges are limited in number by law. Challenges for cause are unlimited in number, and the judge must decide whether or not to grant each such challenge.

The courtroom selection process is more dramatic and has more choice-making potential when the strike system is used.[18] The strategists are confronted with a group of persons about each of whom they have quite a bit of information. Setting the priorities and deciding how to use the strikes is a team effort of critical importance. Of course, in the other procedure, information about the entire panel is available, and the challenges may be

used carefully to obtain the best possible jury for the case. The certainty of being able to have the equal opportunity to seat each person on the panel, however, is not as great as in the strike procedure.

Once the jury is selected and the offering of testimony begins, the power of the judge to determine what evidence the jury may hear is always important, and is often critical.[19] The same critical nature also pertains to the charge or instructions to the jury that the judge delivers at the conclusion of the presentation of the case for each side. In addition, where a jury deliberates for long periods and cannot resolve a deadlock over a decision, it is common for judges to intimidate the jury by calling them in and urging them in a very paternalistic or even threatening way to reach an acceptable compromise.

Social Science Techniques Utilized in Jury Selection

The Attica Fair Jury Project and the National Jury Project, which grew out of the Attica experience, have developed and continue to develop a systematic approach to jury selection (Fargo, 1977a). Depending on the circumstances of the trail and the time available before the trial, the following social science methods are utilized to challenge unrepresentative or biased grand and petit jury pools or to select particular trial juries: jury composition studies, community attitude surveys, community network surveys, voir dire techniques, courtroom observation and analysis of potential jurors' verbal and non-verbal behavior (Kairys, Schulman and Harring, 1975).

The jury composition study involves a comparison of the jury pool with the population in the jurisdiction to determine whether or not certain cognizable classes[20] of people are represented in the jury pool. Statistical theory is utilized to make these systematic comparisons between jury pools and census data. Since evidence of discrimination in the process by which the jury pool is constituted strengthens a jury challenge, the selection process is examined for compliance with relevant statutes. The people who implement the jury selection are interviewed to discover whether or not they have or use any opportunities to discriminate against certain members of the community. All evidence--interview data, statistical and legal--is presented in a pre-trial motion and hearing, if allowed, utilizing the social scientists involved to present the evidence and statistical reasoning (Kairys, 1972; Kairys, Schulman and Harring, 1975; Chevigny, 1975; Levine and Schweber-Koren, 1976; Alker, Hosticka, and Mitchell, 1976).

Community attitude surveys involve standardized interviewing techniques by telephone or in person for a random sample of the population in the particular jurisdiction. Information is developed on respondents' demographic and socioeconomic characteristics and attitudes (close-ended format) relevant to the facts and issues of the particular case. Such attitudes usually include, at a minimum, political cynicism and feelings about militance, protest activities, police, crime, prisoners, various racial

or ethnic types, and various political groups. The data can be analyzed statistically to document need for a change of venue because of community prejudice (Schulman et at., 1973; Moore, 1974) or to feed into a rating system for selection of individual trial jurors (Schulman et al; 1973; Kairys, Schulman and Harring, 1975; Fowlkes and Noble, 1977).

Community networks, utilizing the services of community volunteers rather than commercial juror investigators, involve systematic collection of information (open-ended format) about each potential juror for a particular trial through personal interviews with as many people as possible (excluding immediate family) who know the potential juror. The scope of the community information network accessed may vary from a few community influentials in a small-town or rural setting (Zehr, 1976) to a rather extensive group of people in diverse occupational, organizational, and neighborhood positions in urban areas (Kairys, Schulman and Harring, 1975) to a scaled-down version of the latter involving only neighbors in a large metropolitan or other multi-county court jurisdiction (Fowlkes and Noble, 1977). Since community network information is hearsay, information on each potential juror should come from several sources so that consistency or lack thereof can be checked. Such information should not be depended upon blindly and wholly when jurors are being selected.

Voir dire techniques involve development of open human relations between defense and potential jurors, construction and use of open-ended questions to elicit potential jurors' feelings, and use of leading questions to educate potential jurors on their rights and responsibilities. These techniques are applications of interpersonal relations and communications theories (Ginger, 1969; Bennett, 1977). Used in tandem with voir dire techniques, courtroom observation and analysis of potential jurors' verbal and non-verbal behavior contribute to an understanding of these peoples' personalities and group suitability (Moore, 1974; Kairys, Schulman and Harring, 1975).

In conclusion, social scientists trained in statistical theory, survey research, statistical data analysis of aggregate and survey data, and applied psychology in the areas of interpersonal relations, verbal and non-verbal communications, and group dynamics, are potential contributors to defense teams in political trials. However, because of the political nature of such applied social science, social scientists, as noted earlier, have a special burden--the personal difficulty of synthesizing partisanship and objectivity. They must be able to offer expert advice at the same time that they plan political strategy with the rest of the defense team. They must understand that their techniques contribute only part, though an important part, of the total knowledge and understanding needed to make collective choices in the defense team. In the next section, the political nature of jury selection is discussed at length.

The Politics of Jury Selection

Jury service is one of the few governmental functions in our society that theoretically can be performed by ordinary people. In fact, in most jurisdictions up to this time jury service has been performed by some sort of

elite. For instance, as noted earlier, the juries in the U. S. court system are taken from voter registration lists, clearly an elite group. Efforts to democratize jury service by bringing into it all adult citizens are highly political. Juries have power, and elites do not wish to relinquish power. Jury selection, one of the processes that can be used to democratize the jury, is, therefore, very political in nature.

The immediate political characteristic of jury selection is its use in seeking to win criminal and civil cases (Jacobsohn, 1977). At the same time, the selection process serves as a very effective tool with which to socialize the people of the community to their potential power.[21] Traditionally, political socialization in the United States results in a great number of lower and lower middle class status citizens acquiring little interest in or aptitude for influencing or playing a direct part in the executive, legislative or judicial processes (Dawson and Prewitt, 1969). Organized political activity in the judicial process around jury selection and the possibility of jury service are avenues through which the people can experience what we term counter-socialization. Counter-socialization is defined as attempts to break the people's devotion to or resignation to the present politico-economic system characterized as unjust and illegitimate by those made conscious of their political oppression.

Every aspect of jury selection can be used to counter-socialize the people, indirectly and directly. The composition challenge can result in a broadening of the jury pool, thus giving more types of people a chance to participate on juries. The community attitude survey may influence those surveyed, and the results are useful for future political planning as well as for jury selection or change of venue motions. The community network produces additional direct contact with the people. The courtroom work is the dramatic performance on stage in front of the community. Perhaps the most politically effective part of the selection process is the work of the defense committee.

The defense committee usually is made up of family and personal friends of the defendant(s) in the case. Committees are used most often in criminal cases. In addition to family and friends, the committee attracts ideological adherents to the issues in the case. Assuming that the case involves anti-establishment positions held by "outs," a primary goal of the committee is to counter-socialize the community. The tactics used in this effort are many of the ones familiar to community organizers. Literature is developed on the case and its issues, the courthouse is picketed, church rallies are held, money is raised, and the courtroom is packed with defense supporters. The mass media are hard put to ignore all of this activity.

Defense committee input directly into jury selection takes various forms: providing logistical support for jury workers coming in from outside the community, actually doing some of the interview work in the attitude survey and the network, calling attention of the media and of the community to the trial, putting large numbers of people in the courtroom on a sustained basis, and assisting the defense team in developing the strategy and tactics of the trial. It is crucial that the defense committee interact with the rest

of the defense team in planning actions for the trial. Political activity of this sort thus becomes open and noticeable to all involved citizens. The focus is on the trial, hence on the jury, and this highlights the citizen function of jury service, which in most communities is related to voter registration.

An organized defense committee in the minority community is important particularly in a trial with a minority defendant, a few minority members on the venire list and even fewer on the trial jury. Often the establishment has so intimidated the minority community into political silence and passivity that potential minority jurors are afraid to serve in a political anti-establishment case. Hence community actions on the streets, at rallies, and in the courtroom give these minority persons who are potential or actual jurors the support that they need to summon the courage to serve and to serve in a strong and committed fashion. The same thing is true for a trial where the defendant is not a minority person but is a member of an unpopular and untolerated group or who has such views.

Defense committee leadership may be of two types, indigenous and imported. Effective defense committee efforts can contribute to the development of new local political leadership with new ideas and attitudes about the political system. The new local leadership, combined with what already existed, has the potential to continue vital aspects of general jury work, all of which in fact is part of jury selection. Voter registration drives can add many more potential juror names to the local jury pool. These efforts will increase the chances of non-elites' being on future trial and grand juries.

Voter registration drives also can affect grand juries, which indict and investigate. An infusion of non-elites into the grand jury system conceivably could have an impact on local policy making. Even prosecutors and judges might receive some counter-socialization, as is certainly possible in a political trial, criminal or civil. White collar crime might come under attack. Prosecutors could be held to higher standards in seeking indictments. Grand juries make policy recommendations. The recommendations could become more relevant to real community interests and needs. The grand jury inspection of local public institutions could result in improved jail conditions. Democratization and counter-socialization of the grand jury has much potential for penetrating the shell of elite power, privilege and discrimination that pervades most communities.

Carefully planned and executed defense committees can make an imprint far beyond the outcome of the immediate trial, win or lose, and can leave a residue of leadership and organization that will make a permanent contribution to the political life of the community. With this understanding of the nature of jury selection as political action. We now will discuss the theoretical perspective that interest groups and the mobilization of bias can lend to jury selection as political action.

Jury Selection and the Mobilization of Bias to Strive for Justice

As we reflect on our study of jury selection as political action, we turn our attention again briefly to political knowledge. If we are to maximize our acquisition of political knowledge and make the best possible use of it, social science procedures must function as political action, and political actions must function as research procedures. We have demonstrated that in the process of jury selection research, procedures have functioned as political action--influencing court procedures and outcomes, opening aspects of jury selection to public view, increasing participation in the jury selection process, and making members of the public aware of jury selection and the politics around it.

Although we see much potential in political action as research procedure, we already have learned much by this means. However, political action as research procedure around political trials remains an undeveloped area of work. This results primarily from three factors: (1) mobilization of bias against such activities, (2) little communication of the vision of the connection between issues in the court and important issues outside of the court, and (3) lack of political organization to develop actions as research procedures.

In regard to the mobilization of bias against jury selection as political action, we need to become more aware of the techniques by which such bias is mobilized and to publicize these techniques. Further, we need to exploit "some kinds of conflict" (Schattschneider, 1960) in order to mobilize bias favorable to defense organization and community-based opposition politics. Although such an interest group approach to politics and knowledge has been criticized and may never transcend interests to reach higher ideals,[22] it could give us the orientation needed in our search for knowledge by political action.

In order to proceed with our purpose of searching for openings in and around the jury selection process in which we could initiate and encourage political action, and thereby obtain more political knowledge, we find that E. E. Schattschneider (1960, p. 71) provides useful orientation:

> All forms of political organization have a bias in favor of the exploitation of some kinds of conflict, and the suppression of others because organization is the mobilization of bias.

We need fully to take into account the fact that courthouses have their own political culture and organization.[23] Courthouse organizations are mobilized against anyone who disturbs in any way normal courthouse practices. This mobilization of bias tends to prevent or to make extremely difficult much significant political action in and around courthouses. Courthouse mobilization against political action is effective especially in courthouses where politics and judicial decisions are ground out without benefit of publicity. Also, when lack of representativeness

of jury pools results in exclusion of minorities and persons with unusual ideological perspectives, minorities and those with different ideological perspectives may have difficulty in getting far enough inside the door of the courthouse to lay a political base for action. Further, this mobilization of bias tends to prevent exploration of courthouse bias that could be conducted in a more open situation.

It is argued that jury selection based on social science research endangers the rule of law.[24] However, what is in danger, however slightly, is the present distribution of power. "Scientific" jury selection is a threat to the closed political status quo rather than to the rule of law itself. The rule of law argument is used as a symbol by those who support the status quo in courthouse culture to mobilize their own bias and to suppress conflict. The rule of law argument has functioned effectively in this regard. Balbus (1973, p. 24) points up the basic contradiction in the functioning of the rule of law and how it deviates from its own dictates under cover of a relatively closed system:

> Long-run legitimacy and the need to maintain an ongoing repressive mechanism are hopelessly at odds with one another. The response on the part of court authorities to this contradiction has been to maintain verbal and symbolic adherence to formal rationality [including the rule of law] yet at the same time to develop a covert sanctioning system which departs at every important stage from its dictates.

In short, the "authorities" have worked out an effective system for mobilization of bias in the courts.

Since fundamental biases hide behind this "covert sanctioning system" and are maintained by it, exposure of it is necessary for the success of those who oppose established court practices. Balbus (1973, p. 24) continues:

> Obviously, the adequacy of this "solution" [described above] from the point of view of the authorities depends entirely on their ability to maintain the guise of formal rationality and prevent the covert sanctioning system from reaching widespread public attention.

Having identified a possible vulnerability in this control system, we need to find directon for exposing and testing this system. Clearly, an important task is to penetrate this "covert sanctioning system," expose the cover up, and bring both to "widespread public attenton." An effective place to start this work is in the jury selection process. It is easier to obtain publicity in political trials, and the nature of juries, especially the investigative authority of grand juries, provides an effective work base for this investigation and exposure.

If adequately organized, exposure of contradictions in such sanctioning, covering up, and statements about them by authorities possibly could lead to increased citizen participation (Jacobsohn, 1977) rather that increased citizen cynicism. The excitement created by action to destroy repressive mechanisms and demonstration of results could lead to even more citizen participation. All of this could lead to significant experimental and political testing of the control system described by Balbus.

We need to increase citizen participation in opposition to established power arrangements. If we are to use political action as an effective way of gaining knowledge, this is necessary. Without citizens' confronting elites and power structures in the courts, we cannot obtain a clear view of community power structures nor gain an adequate understanding of the dynamics by which elites exercise and maintain power in the area of criminal justice nor test the capacity of elites to suppress conflict. Without increased citizen participation in opposition, it is extremely difficult, if not impossible, to expose fully the important connections between elite power and the quality of justice produced in our courts. With such conflict, the chances of exposing these connections are increased.

To obtain the needed participation in opposition, and, thereby, an adequate description of power and its exercise in the courts, it is necessary in political trials for the defense to be politicized. Although the trial itself is already political (either in the sense that it has arisen out of protest and/or in the sense that it results from prosecution for political reasons), politicization of the defense requires special steps related to counter-socialization. The first such task is to educate as many community members as possible on the political nature of the case and events that have led to the trial. Another important step in this process of making the defense more political is politicization of jury selection. This can start by educating community members on the political nature of juries, on bias in jury selection and on possible ways of shaping jury selection. It can continue by helping them to be present in the courtroom and to participate in the action. Through this process, community members can learn about the political nature of criminal justice and how they can participate in a politics in opposition to established practices.

Through the politicization of the defense in opposition to the politics of the state and the politics of special elites, intersections between politics and justice come into focus. Such a combination between political vision and the kind of political action described above could set the stage for action-experimental studies of elite power, citizen power, and their relations to justice. Political scientists and community people could join forces in an action-experimental framework to study the intersections among important troubles, problems and issues in relation to justice.[25] Such joining of action and experimental studies could produce valuable knowledge of power and the processes by which it shapes our quality of justice, knowledge which could be input to further political action.

Jury selection can be understood best in connection with the political nature of juries and the method and consequences of jury decisionmaking. If understood in this way, jury selection is an unusually desirable place for

political scientists to begin organizing their work for participation, for action, for knowledge, and for justice. Increasing citizen participation is the key to success in this organizing. A first step that political scientists can take toward increasing citizen participation around juries is that of recognizing and helping to give public recognition to: (1) authority and power of juries, (2) the profound contradiction between the concept of equal representation on juries and the deep biases in the jury selection process, (3) juries as opportunities for citizens to assume responsibilities for decisions of great consequence in a short enough time-frame so that consequences of these decisions may be observed and evaluated by citizens.

Our experience as political scientists attempting to shape the jury selection process in political trials and our reflection on the possibilities of organizing political action to obtain political knowledge have led us to conclude that jury selection and jury studies generally constitute an area where action-experimental research could bear much fruit. Although we are going beyond what Paul Goodman (1962) suggested in his "postulates for a pragmatic social science," we find his guide useful for understanding and building action-experimental research. We should recognize that "the experimenter is one of the participants [actors]," that "an unthought-of solution" may emerge in the process of the action, that the experimenter is committed to the action and its purpose, and that the experimenter must risk confusion . . . and try out untested expedients" (Goodman, 1962, pp. 19-20).

Of course, such action-experimental work, as suggested in this paper, cannot be conducted with much success by one or a few. Political scientists and ordinary citizens need to join together to carry on this work. In this context, we find David Riesman's (1954, pp. 480-81) idea of a "social science milita" useful. Ordinary citizens could be asked to participate in forming theoretical, investigative, logistical, and publicity panels on political trials. As Ivan Illich (1974) has pointed out in his notion of "counterfoil research," action-experimental studies would not succeed unless the community determined research needs. In such organization, we might join the vocation of political scientist and political activist. As political scientists, we could share our political knowledge and could learn to work effectively with other citizens to open up political action that would result in democratizing jury selection, increasing political knowledge and democratizing its use, and decreasing injustice in the United States.

Before leaving this exercise in reflection, we should take warning from students of organization. C. Wright Mills (1959, pp. 100-17) has warned us that "bureaucratic ethos" prevents social science from vision, political involvement, and contributions useful to opposition politics. Theodore Lowi (1971, pp. 3-31) has warned us of the "iron rule of decadence," and Erving Goffman (1967, p. 195) has told us that "actions tend to be organized out" of our lives. However, Henry Kariel (1969) has given us hope for success in his essay, "Political Science as Public Action." Perhaps it is time to call a short moratorium on writing and join in organizing a citizen/social science militia in which we demonstrate that political action is possible, that to act is to know, and that we are serious in our concern for justice.

FOOTNOTES

[1]Diverse treatments of these various trials can be found in social science, legal, literary and journalistic sources. For example, on the trial of Huey Newton, see Ginger (1969); on the Angela Davis trial, see Timothy (1974) and Moore (1974); on the trial of Dr. Spock and others, see Mitford (1969); on the Ellsberg-Russo (mis)trial, see Schrag (1974); on the trial of the Catonsville 9, see Berrigan (1970); on the first trial of Inez Garcia, see Salter (1976).

[2]The National Jury Project presently functions as a national organization with four regional offices in Atlanta, Georgia, Berkeley, California, Minneapolis, Minnesota, and Boston, Massachusetts.

[3]By political action is meant political activity--attempts to influence or control the "authoritative allocation of values for society" (Easton, 1965)--that is at least novel, public, and consequential. For important discussions of political action, see Arendt (1958), Thompson (1969), and Kariel (1969). Goffman (1967) does not name the action he discusses political, but his discussion provides important insights into political action.

[4]For an important discussion of knowledge in relation to self and context, see Polanyi (1966).

[5]By design both legal and cultural the public is excluded from access to much political activity so that potential political knowledge remains hidden.

[6]Erving Goffman's (1961) concept of role distance is helpful in understanding what is involved in working effectively in situations of contradictory role expectations and may help social scientists to survive without destruction of their "objectivity."

[7]This section is a revision of a section from Fowlkes and Noble (1977).

[8]For the early history of the jury in Europe, see Keeney (1952).

[9]Two useful examinations of the history and functions of the grand jury are Edwards (1973) and Clark (1975). On the abuse of the grand jury, see Cowan (1973), Coalition to End Grand Jury Abuse (1976), and Frankel and Naftalis (1977).

[10]Verdicts, moreover, need not be unanimous (Apodaca v. Oregon, 406 U. S. 404, 1972).

[11]Racism in jury composition has been a problem since the end of Reconstruction. See Strauder v. West Virginia, 100 U. S. 303, 1880; Norris v. Alabama, 294 U. S. 587, 1935; Avery v. Georgia, 345 U. S. 559, 1953; Swain v. Alabama, 380 U. S. 202, 1965; Ristaino v. Ross, 424 U. S. 589, 1976, for examples. A particularly heinous case where the U. S. Supreme Court naively assumed that the government of Georgia would not execute a black man who had been given an unconstitutional trial is Williams v. Georgia, 349 U. S. 375, 1955.

[12]See Kairys, Schulman and Harring (1975, pp. 12-13).

[13]See Thiel v. Southern Pacific, 328 U. S. 217, 1946, for a case that can become the bedrock for building the recognition of social and economic class as a regular requirement for a fair cross-section.

[14]See, for example, Chevigny (1975). Other studies of discrimination in jury composition include Alker, Hosticka and Mitchell (1976) and Levine and Schweber-Koren (1976).

[15]The venire list is the list of persons who are to be called for jury duty during a given term or part of a term of court.

[16]An exhaustive work on jury selection for lawyers is Busch (1959). See also Bodin (1954) and Kairys, Schulman and Harring (1975).

[17]The U. S. Supreme Court has ruled that in a federal prosecution a defendant who claims it must be granted the right to challenge the constitutionality of the jury pool. See Test v. U. S., 420 U. S. 28, 1975.

[18]On the gaming nature of this aspect of jury selecton, see Brams and Davis (1976a) and Brams and Davis (1976b).

[19]The rules of evidence in judicial proceedings give judges a vast and seemingly arbitrary power in determining what evidence the jury may hear, and what witnesses the jury may hear. The judge decides, for example, if a proposed witness shall be qualified to be heard as an expert witness. In the process of making such decisions a judge learns much more about the evidence in a case than does the jury. A classic study of the trial jury that examine this judge-jury dichotomy is Kalven and Zeisel (1966).

For a review of the cases relevant to the cognizable classes of race and ethnicity, socioeconomic or occupational status, sex, religion, age, geography, political beliefs, durational residency, and non-citizens, see Kairys, Schulman and Harring (1975, pp. 10-14).

[21]The following observations are based on our experiences as members of defense teams for various political trials in Atlanta and Hawkinsville, Georgia, and Wilmington, North Carolina. Members of various Marxist-Leninist groups have provided the impetus for defense committees for some of the defendants, and these well organized small groups provide a model for laying a political base in the community.

[22]Tom Denyer (1976) would call this interest group approach "instrumental jurisprudence." He provides a valuable critique of such approaches to the politics of justice.

[23]For an excellent report on the mobilization of bias in courthouse culture, see the following statement by William Hollingsworth, state prosecutor in Talladega County, Alabama, as it appears in the record of Swain v. Alabama, cited in Bell (1973, p. 960):

> Many times I [Hollingsworth] have asked Mr. Love [local attorney], for instance, I would say there are so many colored men on this jury venire, do you want to use any of them, and he would say, my client doesn't want them, or we don't see fit to use them. And then if I didn't see fit to use them, then we would take them off. We would strike them first or take them off . . . .

For another discussion of bias in the courthouse, see Swett (1972, pp. 41-55).

[24]See, for example, Etzioni (1974); but see Moore (1974) in defense of such political action.

[25]This idea is derived from the socio-political work of C. Wright Mills (1959). See also Bray (1973).

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